

ORIGINAL

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of ) GC Docket No. 92-52  
 )  
Reexamination of the Policy )  
Statement on Comparative )  
Broadcast Hearings )

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COMMENTS OF AUGUST COMMUNICATIONS GROUP, INC.  
AND JOHN W. BARGER

1. Summary. The public interest would be served by a regulatory system that would foster only serious applicants who are ready, willing and able to carry out their proposals for construction and operation of new broadcast stations for a meaningful period of time. The decision to file and prosecute such applications should not be made lightly or for speculative profit-taking purposes, and the public interest would be served by a regulatory system designed to prevent this. Any such regulatory program should have rules and procedures to support the filing of serious applications and the exclusion of speculative applications. Among other things, such rules and procedures should give applicants a precise understanding of what is expected of them by the FCC when they file and prosecute an application for authorization to build a new broadcast station. Also, such rules and procedures must provide for the processing of applications in an efficient and expeditious manner, so that parties who file applications will know the result of that process within a reasonable period of time. Without such groundrules and an efficient regulatory system, the process may

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well be unlawful and without doubt is unfair to the citizens who participate in the process. In the passages that follow, August and Mr. Barger provide comments regarding the "three year rule" proposal with the foregoing perspective in mind.

2. Background of Commenting Parties. August Communications Group, Inc. (August) is an applicant for construction permit for a new FM broadcast station that will serve Round Rock, Texas (located in the Austin radio market). The controlling, 70% voting stockholder of August, who will be responsible for providing funds for construction and initial operating capital, is John W. Barger, whose lifetime career has been in broadcasting.<sup>1</sup> The other, 30% stockholder of August is Hazel Obey, a state official employed at the top level of the Texas General Land Office with a lifetime record of achievements in local, state and national community, civic and political activities. Mr. Barger and Ms. Obey propose to be full time management employees at the Round Rock radio station, Mr. Barger serving as the general manager based upon his lifetime career experience in broadcasting, and Ms. Obey as the station manager, learning the radio business from Mr. Barger and employing her management and other skills that have gained her professional and

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<sup>1</sup> Mr. Barger's credentials include service as an executive and general counsel of the McLendon Corporation, a major group owner and conglomerate headquartered in Dallas, Texas, chief operating officer of Clear Channel Communications, Inc., a major group owner headquartered in San Antonio, the general manager of radio stations in both markets, a major market station owner/operator, a station broker and a leader in radio industry organizations including service as President of the Texas Association of Broadcasters.

personal success in other fields.

3. The application for construction permit for Round Rock, Texas was filed in July 1988, more than five years ago. The Commission did not issue a hearing designation order regarding this and other, competing applications for a period of two and one-half years, i.e., January 1991. Following discovery and other preliminary matters, the initial comparative hearings were held in November 1991. Certain issues were added, and hearings on those issues were held in June 1992, when the record was closed. An initial decision has not yet been issued in the matter. When this is done, there will no doubt be an appeal to the Review Board. That appeal process usually takes about nine months, start to finish. When the Review Board's decision is issued, there will no doubt be applications for review submitted to the full Commission. That process takes anywhere from six months to eighteen months. Accordingly, it is fair to say that this case, which is now well into its sixth year, will have consumed on the order of eight years before administrative finality within this agency. An appeal to the Court of Appeals would bring the total to on the order of ten years. Persons who propose to be "integrated" as owner-managers of a radio station, thus, must place their lives and career interests "on hold" while awaiting an FCC decision for something like 10-15% of their entire life and 20-25% of their adult working life. This is before they undertake to carry out the ownership-management commitments that they have made to the Commission.

4. Mr. Barger, individually, has also applied for construction permit for a new FM radio station to serve Haltom City, Texas (located in the Dallas-Fort Worth radio market). With regard to that application, Mr. Barger proposes to own the station and oversee the management of the station in the manner of group owners throughout the nation. He has challenged the FCC policy that "integration" of ownership and management as decreed by the Commission is the only and exclusive means of selecting an applicant who would most likely effectuate program service in the public interest. Mr. Barger has offered alternative evidence of his proposed style of ownership-oversight of management based upon a lifetime of broadcast management as equally probative (indeed, in his view, much more so) of the likelihood of effectuation of program service in the public interest.

5. The application for construction permit for Haltom City, Texas, was filed in September 1989, a little over four years ago. The Commission did not issue a hearing designation order regarding this and other, competing applications for a period of more than one and one-half years, i.e., May 1991. Following discovery and other preliminary matters, hearings were held on the initially-designated and subsequently-added issues, and the record was closed in September 1992. An initial decision was issued one year later in September 1993. Seven applicants, including Mr. Barger, have appealed to the Review Board, a process which takes about nine months, start to finish. When the Review Board's decision is issued, there will no doubt be

applications for review filed with the full Commission. That process takes anywhere from six months to eighteen months. Accordingly, it is fair to say that this case, which is now into its fifth year, will have consumed on the order of seven years before administrative finality within this agency. An appeal to the Court of Appeals would bring the total to on the order of nine years. Thus, Mr. Barger is in the position of placing his career interests -- in terms of building, operating and overseeing the management of the Haltom City station -- on hold for the better part of a decade while awaiting final action by the Commission in the matter.

6. With this background, August and Mr. Barger wish to offer two comments to the Commission, one, to provide an alternative to the FCC's proposed three-year rule, and two, to express the view that the law requires the Commission to limit the application of its prospective new rules to applications that are filed after the date of adoption of the new rules.

7. Alternative suggestion to the Commission's proposed "three year rule." The Commission's further notice of proposed rulemaking, released August 12, 1993, proposes to amend the existing one-year minimum holding period for parties who secure construction permits on the strength of their ownership-management proposals in comparative hearings to a three-year minimum holding period. This proposed extension of time from one to three years relates to ownership of the station, not necessarily the management proposals. Notice at ¶¶1, 17(a),

relative to 47 C.F.R. §73.3597(a)(1). The Commission has called for comments whether the management proposals should also be carried out and certified to the FCC after the end of the first year. Notice at ¶¶14, 17(c).

8. August and Mr. Barger believe that the Commission should take steps to ensure that only serious, fully-qualified applicants, having the credentials to build and operate their stations, are permitted to intrude on the application process. Until this is done, the comparative application and hearing process will continue to be, in many instances, a horrendous waste of time, energy and money. For example, in their view, the Commission should seek from Congress authority to charge higher application filing and hearing fees geared to the size of the population to be served (e.g., 10 cents per person located within the proposed city grade contour), preventing the opportunistic and phony FCC "application filers" from plying their trade whenever new channels open up for application. For another example, the entrance level of financial qualifications requirements should be strengthened, again to insure the filing of applications by parties who can and will carry out their construction and operating commitments to the exclusion of parties having no realistic capability of doing so. For still another example, the comparative criteria should be modified to welcome experienced broadcasters, not discourage them, from participating in the comparative hearing process. The current "integration" system encourages persons who are not remotely

qualified to run a radio station to promise to be the general managers of their radio stations, eschewing seeking advice or even talking to their silent, passive moneyed partners who might know something about the business, a system which makes no sense in the real world of broadcasting.

9. August and Mr. Barger are also of the view that there has to be a realistic limit on the time period for which persons involved in FCC applications must place their personal and career interests on hold. To that end, they offer the following alternative proposed rule: whatever the commitment that is made by an applicant -- whether that be ownership of the station, full time management of the station, a combination of ownership and management of the station, ownership supervision of management of the station, moving to the community of license, etc. etc. -- shall be geared to a specified period of time which dates back to the filing of the application. We suggest a period of six years, which represents about 8-10% of a normal life span of the individual and about 15% of his or her normal adult working lifetime.

10. Under this alternative proposal, the extent to which such a commitment is translated into actual public interest broadcast operations is then up to the Commission. If uncontested applications by parties having the financial resources to construct and operate their stations were processed without delay and tight construction timetables were maintained, this would result in a translation of the commitment into actual

broadcast operations over a period of four years, perhaps even longer. If contested applications were processed through a comparative hearing in, say, two years, and allowing for prompt construction of the station thereafter by a fully-qualified applicant, this would result in a translation of the commitment into actual broadcast operations over a period of about three years, perhaps a little bit longer. And in the process, the Commission's expectations of applicants to keep their lives on hold would be held within a reasonable and humane period of time.

11. To those who think that it is unrealistic to complete an FCC comparative process within two years, August and Mr. Barger suggest that a re-evaluation of the Commission's comparative hearing system is in order. Over several decades, the Commission, attorneys, parties and others have grown used to five-to-ten year FCC comparative hearing proceedings, which are now common place and what many have come to expect (perhaps with a shrug of the shoulders). But, please, consider, for example, the performance of the Louisiana State Public Service Commission which operates under a statute requiring that various types of applications and other requests be processed from start to finish within one year. Louisiana Const. art. 4, sec. 2 (1974). Under such a time constraint, the Louisiana PSC has processed applications for a \$6 billion dollar atomic energy plant and requests for mega-dollar state-wide rate increases for electric, natural gas and telephone services, in each instance within a period of one year, start to finish. If this can be accomplished



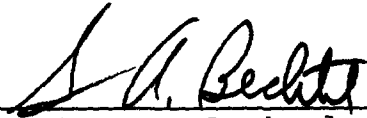
for such complex matters within a period of one year, surely, this also can be accomplished in the determination of who should own and operate a radio station within a single community within a period of one year.

12. The unlawful nature of retroactive application of new rules. The new rules adopted by the Commission in this matter, whatever they may be, should not be applied to applications on file prior to the date of adoption of those rules. Such rules will constitute a substantive change in the law of the obligations, burdens and duties of applicants before the Commission. There is nothing in the general rulemaking powers of the FCC, 47 U.S.C. §303(r), or in the rulemaking powers of the FCC relative to broadcast applications, 47 U.S.C. §§308-309, which authorizes the Commission to change the law by adopting and applying new rules retroactively. Absent Congressional authority, the agency does not have the power to make such a change in the law on its own motion. Bowen v. Georgetown University Hosp., 488 U.S. 204, 109 S.Ct. 468 (1988).

13. In addition, such action would violate the Administrative Procedure Act, which defines rules within the meaning and scope of that act as: "...an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..." 5 U.S.C. §551(4) [emphasis supplied]. See, the 1947 Attorney General's Manual interpreting the Administrative

Procedure Act, which states that rules "must be of future effect, implementing or prescribing future law." AG's Manual at 13 [emphasis in original]; see, also, Bowen v. Georgetown University Hosp., supra, Concurring Opinion by Justice Scalia.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. A. Bechtel", is written over a horizontal line.

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October 13, 1993

Certificate of Service

I, Gene A. Bechtel, certify that I have caused courtesy copies of the foregoing COMMENTS OF AUGUST COMMUNICATIONS GROUP, INC. AND JOHN W. BARGER to be placed in the U.S. mail, first class, postage pre-paid this 13th day of October, 1993 to the following individuals:

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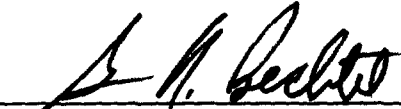
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